996

FILED
MAY 4 1896
JAMES H. McKENNEY,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1895.

WALTER S. CHEESMAN AND GEORGE W. CLAYTON,
Petitioners,

vs.

JAMES A. SHREVE, J. A. PERKINS, BENJAMIN T. WELLS, J. T. HART, O. H. AIKINE, AS ADMINISTRATOR OF THE ESTATE OF CHARLES HUGHES, DECEASED, CHARLES HUXLEY, DAVID MILLS AND H. G. BURLEIGH,
Respondents.

Brief and Argument

IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

CHARLES J. HUGHES, JR.,
TYSON S. DINES,
Attorneys for Petitioners.

CLARK & REID, PRINTERS, 1335 LAWRENCE ST., DENVER.

This objection is not technical merely. As before shown, some of the facts appearing to the Circuit Court of Appeals which were very material to a correct decision of the matter, are not set out in the petition; and inasmuch as the granting of this petition is matter resting in the discretion of this Court, the exercise of such discretion should only be invoked when this Court has had a full and fair opportunity to judge of the merits and equities of the case, after a consideration of the whole record. If this rule were not insisted on, it might be possible for applicants to show that in their cases the most important questions of law arose, when a perusal of the record would show that such questions were not nearly so important as they appeared to the biased judgment of the defeated party.

III.

THE PETITION SHOULD BE DENIED.

Respectfully submitted.

THOMAS M. PATTERSON,
CHARLES C. PARSONS,
Attorneys for Respondents.

996

Office Supreme Court U. S.
FILED.
MAY 4 1896.
JAMES H. McKENNEY,
CLERK.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1895.

WALTER S. CHEESMAN AND GEORGE W. CLAYTON,
Petitioners,

vs.

JAMES A. SHREVE, J. A. PERKINS, BENJAMIN T. WELLS, J. T. HART, O. H. AIKINE, AS ADMINISTRATOR OF THE ESTATE OF CHARLES HUGHES, DECEASED, CHARLES HUXLEY, DAVID MILLS AND H. G. BURLEIGH,
Respondents.

Brief and Argument

IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

CHARLES J. HUGHES, JR.,
TYSON S. DINES,
Attorneys for Petitioners.

CLARK & REID, PRINTERS, 1335 LAWRENCE ST., DENVER.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1895.

WALTER S. CHEESMAN AND GEORGE W. CLAYTON,
Petitioners,

vs.

JAMES A. SHREVE, J. A. PERKINS, BENJAMIN T. WELLS, J. T. HART, O. H. AIKINE, AS ADMINISTRATOR OF THE ESTATE OF CHARLES HUGHES, DECEASED, CHARLES HUXLEY, DAVID MILLS AND H. G. BURLEIGH,
Respondents.

Brief and Argument.

I.

Does an erroneous construction placed upon a State statute by a Judge of a nisi prius Federal Court constitute a rule of property which another nisi prius Judge is bound to follow in another and different cause between other and different parties?

It will be seen by the petition for writ of *certiorari* filed herewith, that Judge Riner, while holding the Circuit Court of the United States for the District of Colorado, at Denver, refused to vacate a final judgment entered in favor of petitioners, for the reason that respond-

ents had failed to comply with the provisions of the statute of Colorado requiring them to pay all costs as a condition precedent to the granting of such new trial.

On writ of error from the decision of Judge Riner in refusing to vacate the judgment, the Circuit Court of Appeals for the Eighth Circuit, while holding this decision right, so far as the law and the construction of the statute was concerned, reversed it for the reason that another Judge, some three years previous, had construed the statute differently, although such construction was in another and different case, and held to be wrong.

The Circuit Court of Appeals in this opinion, as expressed by Judge Thayer in the dissenting opinion, placed the Judge of the Circuit Court in the unfortunate position of being unable to decide correctly. If the Circuit Court had sustained the motion to vacate the judgment and grant a new trial, as of right, and your petitioners had appealed from that decision, under the decision of the Circuit Court of Appeals, the vacating of the judgment would have been erroneous, and the decision would have been reversed. If, upon the other hand, he had done as he did do in this case, refuse to vacate the judgment and to grant a new trial for reasons which the Circuit Court of Appeals has upheld as sound, his decision would have been reversed, because another *nisi prius* decision, unpublished, had seemingly placed a different construction upon the same statute.

The question presented to this Court, as decided by the Circuit Court of Appeals for the Eighth Circuit, is one of the greatest importance to litigants, involving the relations of the United States Judges, and involving the question as to whether or not a *nisu prius* decision of the Circuit Court can in any event be held to be a rule of property. We recognize the fact that it has been the uniform

and established custom of this Court to issue the writ of *certiorari* only in cases involving questions of grave consideration. We do not believe a question could be presented to the Court the decision and determination of which will involve weightier, more extended or important matters to the Federal judiciary and to litigants in Federal Courts than the present one.

It will be seen from the quotation contained in Judge Thayer's dissenting opinion, taken from the opinion in Parkhurst vs. Price, involving the construction of Section 272 of the Civil Code of the State of Colorado, that there was no determination of the question as contended for by respondents, and, in any event, such decision could not have become a rule of property binding all subsequent Judges holding the Circuit Court to that construction of the statute.

The decision in Parkhurst vs. Price was a simple announcement from the bench, without argument or presentation of authorities, hesitatingly and informally delivered. So doubtful was Judge Hallett in delivering it, as to its correctness, that the attorney in that case, seeking to vacate the judgment, paid all the costs of the preceding mistrial.

The question is squarely presented by the record of this case as to the weight to be given to the decisions of the Circuit Courts of the United States by the Judges of other Circuit Courts of the United States, and as to the effect of such decisions upon other and different and subsequent litigants.

It will be seen that the Circuit Court of Appeals for the Eighth Circuit has held that where one Judge holding the Circuit Court of the United States construes a statute as in this case, although the construction is wrong,

and although the decision, if appealed from, would have been reversed, that another and different Judge afterward, holding the same Circuit Court, is bound by that decision, and that such decision has the effect of an adjudication upon all subsequent litigants involving different property rights, between different parties and tried by different Judges. It must follow from a decision of such far reaching scope and importance as this one that, if it is permitted to stand, Judges holding other Circuit Courts of the United States will be bound to follow such decision. It is an attempt to make a prior decision of a *nisi prius* Court between different parties binding upon all subsequent Judges holding such *nisi prius* Courts of co-ordinate jurisdiction within the United States, and is in effect to make one decision when so rendered an adjudication of the same matters in all such co-ordinate Courts until from one of them an appeal or writ of error has been taken and such decision reversed.

It is admitted by the opinion which is set forth in full in the petition in this case, that the original construction of the District Judge holding the Circuit Court for the District of Colorado was wrong. It is admitted by this opinion that the decision of Judge Riner in the present case was, so far as the law, the reasoning and the facts are concerned, correct; but, because Judge Riner delivered a correct decision, and correctly construed the law, and refused to follow the former erroneous decision, the Circuit Court of Appeals for the Eighth Circuit reversed the case and ordered a certain time, different from that contemplated by the statute, and different from that provided by law, to be given, in which the respondents may pay the costs which they had previously failed to pay, and obtain a new trial as of right.

It is unnecessary to cite in this brief and argument the authorities supporting the contention that a statute of the character of the Colorado statute, giving a new trial as of right on payment of costs, leaves no discretion in the Court extending or varying its terms.

The opinion of the Circuit Court of Appeals sustains this contention, while violating it in this particular case.

II.

May the same litigant prosecute two writs of error to vacate the same judgment, one to the Supreme Court, upon the ground of lack of jurisdiction in the Circuit Court which tried the case, and the other subsequently sued out in the Circuit Court of Appeals, upon the ground that the same judgment should have been vacated upon the payment of costs?

It seems to us that it is immaterial upon what ground the writ of error to the Circuit Court of Appeals is prosecuted if there was pending in the Supreme Court a writ of error, which, if successful, would establish the fact that the trial Court was without power to enter any judgment. It would be a vain and useless thing to have the Circuit Court of Appeals undertake, upon some other point than jurisdiction, to determine the correctness of the judgment or the right of the plaintiffs in error to have it vacated, if after all that had been done and said it should be made useless by the decision of the Supreme Court that there was never jurisdiction of the cause.

Under the Act of 1891, creating the Circuit Court of Appeals, we maintain that if a litigant wishes to have the Supreme Court of the United States in the first instance, and before the question is passed upon by the Court of Appeals, determine whether or not the trial Court had jurisdiction, he must elect between that right

which the Act unquestionably gives him and the right to take his case to the Circuit Court of Appeals, including, if he chooses, in the matters to be submitted to the latter Court, or omitting, if he likes, the question of jurisdiction. If he elects to take the question of jurisdiction in the first instance to the Supreme Court of the United States, he has no power or authority to take a writ of error for any purpose thereafter to the Circuit Court of Appeals.

Section 5, 26 U. S. Statutes at Large, 827, provides that appeals or writs of error may be taken from the Circuit Courts direct to the Supreme Court in any case in which the jurisdiction of the Court is in issue, and that in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the Court below for final decision; and Section 626, U. S. Statutes at Large, 828, provides that the Circuit Court of Appeals shall have power to review any case tried in the Circuit Court, so that unquestionably it could as well entertain the question of jurisdiction in the Circuit Court as any other.

The Supreme Court of the United States in the case of McLish vs. Roff *et al.*, 141 U. S., 661, referring to the act of March 23, 1891, 26 U. S. St. at Large, 826, providing for the jurisdiction of the Circuit Courts of Appeals announces that:

"From the very foundation of our judicial system the object and policy of the Acts of Congress in relation to appeals and writs of error (with the single exception of the Act of 1875 in relation to cases of removal, which was repealed by the Act of 1887) have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in it decided in a single appeal."

This is the unquestionable policy and purpose of the law.

Forgay vs. Conrad, 6 How., 201.

It utterly precludes the right, under the Act of 1891, to maintain several writs of error at the same time for the purpose of vacating the same judgment, as was sought by respondents, plaintiffs in error below, in the present instance.

In the case of McLish, plaintiff in error, vs. Roff, defendant in error, *supra*, this Court, after stating the objects of the creation of the Circuit Courts of Appeals and the distribution of appellate jurisdiction between them and the Supreme Court, says, in response to a position taken in that case which might be urged as a justification in the case at bar, as follows:

"It is further argued in support of the contention of plaintiff in error that if it should be held that writ of error would not lie upon the question of jurisdiction until after final judgment, such ruling would lead to confusion and absurd consequences; that the question of jurisdiction would be certified to this Court, while the question of its merits would be certified to the Circuit Court of Appeals; that the case would be before two separate appellate Courts at one and the same time, and that the Supreme Court might dismiss the case upon the question of jurisdiction, while the Circuit Court of Appeals might properly affirm the judgment of the lower Court upon the merits.

"The fallacy which underlies this argument is the assumption that the Act of 1891 contemplates several separate appeals of the same case and at the same time to two appellate Courts. No such provision can be found in the Act, either in express terms or by implication. The true purpose of the Act, as gathered from its context,

is that the writ of error or the appeals may be taken only after final judgment, except in the case specified in Section 7 of the Act. When that judgment is rendered, the party against whom it is rendered must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the Circuit Court of Appeals upon the whole case; if the latter, then the Circuit Court of Appeals may, if it deem proper, certify the question of jurisdiction to this Court."

The principle of this decision certainly sustains our motion to dismiss the writ of error presented and argued to the Circuit Court of Appeals. The respondents, as defendants in the Circuit Court, elected to take the question of jurisdiction alone directly to the Supreme Court. This election having been made, they must abide by it. They may not thereafter, in contravention of the manifest spirit and intention of the Act of 1891, creating the Circuit Court of Appeals, set on foot another or other writs of error and prosecute all of them at the same time. It was held in Citizens Bank of Wichita vs. Farwell, 56 Fed. Rep., 539, that the prosecution of one writ of error takes from the trial Court the power of proceeding further in the case. The removal of the case into the Supreme Court of the United States under the first writ of error transferred the jurisdiction of the suit to that Court, and the jurisdiction of the lower Court over the case was at an end.

Draper vs. Davis, 102 U. S., 370.
Keyser vs. Farr, 105 U. S., 265.
Elliott's Appellate Procedure, Sec. 541.

Hence, after this case was taken on writ of error to the United States Supreme Court, nothing could be done by the Supreme Court for the purpose of prosecuting a writ of error in the Circuit Court of Appeals.

In the case of Northern Pacific R. R. Co. vs. Glaspell, 49 Fed. Rep., 482, the case differed from the one at bar in that one party sought to take the question of jurisdiction directly to the Supreme Court, while the other party brought the case on the other question into the Circuit Court of Appeals. In that case, it could not be held that the election of one of the parties to the suit could or should bind the other, but, even under the circumstances of that case, the Court declined to hear and pass upon the writ of error until the Supreme Court should decide upon the question of jurisdiction. But, in the decision of that case, it seems to us the Court announces a principle which, if prevailing under the situation of the case we present, required a dismissal of the writ of error by the Circuit Court of Appeals. That decision announces as the result of McLish vs. Roff, *supra*, while holding it inapplicable to the question then under discussion, that—

"The Act of March 3, 1891, as is expressly ruled in McLish vs. Roff, does not confer upon one party the right to carry a cause before two separate Courts at one and the same time. Neither, in our judgment, does it confer upon one party the power to defeat the right of appeal upon the merits secured by the statute by taking an appeal or writ of error upon the point of the jurisdiction of the trial Court."

For these reasons, we think the Circuit Court of Appeals was without jurisdiction to entertain the writ of error prosecuted to vacate the same judgment while another writ of error was pending in the Supreme Court of the United States, challenging the jurisdiction of the Circuit Court and seeking to vacate, set aside and annul one and the same judgment. This also is a question of importance. It involves a possible conflict between the

jurisdiction of the several Circuit Courts of Appeals of the United States and of the Supreme Court of the United States. It is a question involving the construction of the Act of 1891 creating the Circuit Courts of Appeals, and, when answered, would determine and settle a question *now* which may well be expected to frequently hereafter arise to the confusion of litigants.

III.

Had the United States Circuit Court of Appeals for the Eighth Circuit jurisdiction in this case upon writ of error, to extend the time within which the costs were required to be paid by the statute of Colorado, for more than one year after the time fixed by the express terms of the statute under and by virtue of which alone the right to a new trial upon the payment of costs arises?

It will be seen that it is decided by the Circuit Court of Appeals that respondents had failed to comply with the provisions of Section 272, of the Civil Code of Colorado. They had failed to perform the condition precedent to the right demanded. The statute is simple in its provisions, and gives no room for construction. Without showing cause, the defeated party, in actions of the character contemplated by that section, may, by performing the conditions prescribed, set aside the judgment of the Court and obtain an important right. The right depends upon the performance of the conditions preceding it. The Circuit Court of Appeals, while deciding that the conditions had not been complied with, and that the costs had not been paid within the time prescribed by the statute, made an order extending that time for more than one year, and permitting the exercise of an important right conferred by that statute, not only after a

failure to comply with the conditions of its exercise, but creating and prescribing other and different conditions than those contained in the statutes. We contend that such order was a final judgment, and final determination of the rights of the parties arising under the statute, and that it was outside of and beyond the jurisdiction of such Circuit Court of Appeals to enter or make such order.

IV.

Where a statute gives a special character of remedy, as is the case in the Colorado statute, Section 272, of the Civil Code of Procedure, and that remedy is thereafter taken away before a final judgment is had, enforcing such remedy, does the remedy not fall with the statute?

This proposition, while not of the scope and far-reaching importance of the others hereinbefore suggested, is yet a question of importance, and directly involved in the present proceeding.

Section 272 of the Civil Code, in force at the time of the attempted payment of the costs and the motion for a new trial, as of right, in the Circuit Court of the United States for the District of Colorado, gave the right to both litigants. Or, in other words, it gave the right to the first defeated party, and if upon a second trial of the case the second party was defeated, it gave him also one trial as of right. This made possible two trials of right without showing cause, and as many other new trials as the Court should grant upon cause shown. The motion made by respondents, defendants in the Circuit Court, for new trial, as of right, under the statute, was filed on the 2d day of November, 1892. It was denied on the 26th day of May, 1894. The writ of error was prosecuted from the Circuit Court of Appeals on the 2d day of November, 1894. The opinion of the Circuit Court of

Appeals, fully set forth in the petition for *certiorari* accompanying this brief, was rendered on the 2d day of September, 1895. On the 13th day of April, 1895, the amended act was approved, as is fully set forth in the petition for *certiorari*.

There being no emergency clause attached, this Act did not take effect until ninety days after April 13, 1895, which makes the 16th day of July, 1895, the date upon which such Act went into effect. Therefore, at the time of the filing of the opinion of the Circuit Court of Appeals permitting respondents, after the 2d day of September, 1895, the date of the opinion, to come into Court and pay the costs which they should have paid theretofore, the statute permitting the right, giving the remedy of a new trial in such cases on payment of costs, had been changed and modified in such way as to take away the right which respondents thereupon attempted to exercise.

This being the case, there was, on and after the 2d day of September, 1895, at the time of the attempted exercise of the right to a new trial under the statute, no statute in force in the State of Colorado giving the right claimed. Therefore, the Circuit Court of Appeals was without jurisdiction to enter such order or to give or create such right to a new trial. There has been a uniform line of decisions from early days holding that where a statute giving a certain remedy is repealed, the remedy falls with the statute. It has been held by this Court that if laws which give the Court jurisdiction in certain cases expire, the jurisdiction ceases, although an appeal is actually pending at the time of the expiration.

United States vs. Boisdore, 8 How. (U. S.), 121.
McNulty vs. Batty, 10 How. (U. S.), 79.
Yeaton *et al.* vs. United States, 5 Cranch, 281.

We respectfully urge the foregoing points upon this petition for *certiorari* as presenting questions of great importance for the consideration of this Court, some of them questions which have not been raised before, and which would, if settled and determined now, possibly set at rest questions which hereafter may again arise to affect important rights of litigants. If settled now by this Court, it would forever settle the important question of the effect of *nisi prius* decisions of the several Circuit Judges of the Federal Courts of the United States, and would also determine the relations of the Circuit Courts of Appeal to the Supreme Court of the United States, so far as the maintaining of writs of error in both Courts at one and the same time is concerned.

The distribution of the appellate powers of the higher Courts of the United States by the Act of 1891 creating the several Circuit Courts of Appeal of the United States is, upon its face, a most important one. The Act itself is comparatively new, and the relation of these Courts to the Supreme Court of the United States has not been passed upon or determined as in case of Courts long established, and the questions of appellate jurisdiction arising under the Act of 1891 have been and are still vexing ones, both to lawyers and to litigants.

The importance of having these matters forever settled and determined is shown by the decision of this Court in the case of McLish vs. Roff, which, we maintain bears upon the principles involved in this, while not settling the questions arising herein.

For the foregoing reasons, we respectfully pray this Honorable Court to order that a writ of *certiorari* issue from this Court to the Circuit Court of Appeals for the Eighth Circuit, ordering said Court to prepare and send to the Supreme Court of the United States the entire